



# THE COMMITTEE ON ENERGY AND COMMERCE

## INTERNAL MEMORANDUM

July 7, 2011

To: Members, Committee on Energy and Commerce

From: Committee Staff

Re: Committee Markup of H.R. 2273, the Coal Residuals Reuse and Management Act and H.R. 2401, the Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011

Beginning on Monday (opening statements only), July 11, and continuing on Tuesday July 12, 2011, the Committee on Energy and Commerce will mark up H.R. 2273, the Coal Residuals Reuse and Management Act, and H.R. 2401, the Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011 ("TRAIN Act").

In keeping with Chairman Upton's policy, Members must submit any amendments they may have two hours before they are offered during the markup. Members may submit amendments by email to: [mike.bloomquist@mail.house.gov](mailto:mike.bloomquist@mail.house.gov). Any information with respect to an amendment's parliamentary standing (e.g., its germaneness) should be submitted at this time as well.

### **H.R. 2273, the Coal Residuals Reuse and Management Act**

#### **Legislative and Regulatory History Concerning FFC and CCR<sup>1</sup>**

Generally, the management and disposal of waste is regulated under provisions of the Solid Waste Disposal Act, also known as RCRA, 42 U.S.C. §6901 *et seq.* Subtitle C of RCRA created a hazardous waste management program that, among other provisions, directs the Environmental Protection Agency (EPA) to develop criteria for identifying the characteristics of "hazardous" waste and to develop waste management criteria applicable to such waste. Subtitle D of RCRA established state and local governments as the primary planning, regulating, and implementing entities for the management of solid waste (i.e., household garbage (or municipal solid waste) and non-hazardous industrial solid waste).

The Solid Waste Disposal Act Amendments of 1980 (Public Law 96-482) contained provisions – known as the Bevill Amendments – that prevented EPA from imposing hazardous waste regulatory requirements for fossil fuel combustion (FFC) waste until EPA studied the issue to determine whether regulation of FFC waste under Subtitle C was warranted. In its 1993 and 2000 regulatory determinations, EPA considered the requisite factors and determined that regulation of FFC wastes, generally, and coal combustion residuals (CCR), specifically, was not warranted under Subtitle C.

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<sup>1</sup> See <http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/regs.htm>

### **EPA's June 21, 2010, Proposed Rule<sup>2</sup>**

On June 21, 2010, EPA promulgated a proposed rule to regulate CCR (75 FR 35128). In the Proposed Rule, EPA set out two regulatory options for management of CCR. Under the first proposal, EPA would reverse the 2000 regulatory determination and regulate CCR as a hazardous waste under Subtitle C. Under the second proposal, EPA would continue to follow the findings of the 2000 regulatory determination and CCR would remain classified as a non-hazardous waste regulated under Subtitle D. EPA states that the main differences between the two proposals involve implementation and enforcement but that both options will require on a national basis liners and ground water monitoring at new landfills handling CCR.

In the Proposed Rule, EPA identified new information obtained since 2000 that calls into question EPA's assessment of the risks posed by CCR disposal. EPA references a 2009 EPA Risk Assessment that indicates certain CCR disposal practices—specifically, disposal in landfills and surface impoundments without composite liners, and disposal of wet CCR—can pose significant risks to human health and the environment. EPA claims in the Proposed Rule that state regulatory programs often lack key protective requirements for liners and groundwater monitoring. Under the Subtitle C proposal, EPA is proposing to require installation of a composite liner and leachate collection and removal system at CCR landfills and surface impoundments, different from what is typically required under Subtitle C. In addition, EPA proposes to require surface impoundments and landfills to be managed so as to control fugitive dust. EPA also is proposing to impose treatment requirements on wet CCR that would effectively phase out wet handling of CCR and disposal of CCR in surface impoundments within five years.

Under the Subtitle D proposal, EPA would develop national minimum standards for landfills and surface impoundments where CCR from electric utilities and independent power producers is disposed. The standards would be based largely on ones that EPA has developed for municipal solid waste landfills, and would include restrictions on location, design, operation, groundwater monitoring, closure, and post-closure care. Certain existing landfills and surface impoundments would have to be closed unless they could meet more stringent safety requirements. The standards under the Subtitle D proposal would also impose controls relating to run-off from the surface of facilities, discharges to surface waters, pollution caused by fugitive dust from landfills, and recordkeeping. The Subtitle D proposal would require that a system of monitoring wells be installed at all new and existing CCR landfills and surface impoundments. As under the proposed Subtitle C regulations, new landfills and surface impoundments would be required to install a composite liner and leachate collection and removal system. Because EPA cannot impose treatment requirements under Subtitle D that would effectively phase out the wet handling of CCR as it has proposed to do under Subtitle C, wet handling of CCR could continue under Subtitle D as long as existing surface impoundments are retrofitted to meet proposed design standards. EPA is also considering a third option—the D prime option—under which existing surface impoundments would not have to retrofit, but could continue to operate for the remainder of their useful lives.

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<sup>2</sup> See <http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/ccr-rule/index.htm>

EPA explained that with respect to beneficial reuse, it will not revise its 2000 determination because of the benefits of beneficial reuse of CCR to both the environment and the economy. In the Proposed Rule, CCR destined for use in new products such as cement, concrete, brick, wallboard, and roofing materials will not be regulated under either Subtitle C or Subtitle D. EPA proposes changing some aspects of determining what is a beneficial reuse. The use of large volumes of CCR in sand and gravel pits or for restructuring landscape (*i.e.*, certain “unencapsulated” uses of CCR) would not be considered beneficial reuse and thus would become subject to regulation.

### **Description of H.R. 2273**

H.R. 2273 would allow states (that have approved programs for municipal solid waste under section 4005(c) of RCRA or are delegated to implement a program under RCRA section 3006) to adopt and implement a coal combustion residuals permit program under Subtitle D. In order to adopt and implement a coal combustion residuals permit program, a state must notify the Administrator of its intent to adopt a program within six months of the date of enactment. Within 36 months after the date of enactment, a state that is implementing a coal combustion residuals permit program must certify to EPA that the state’s program meets the specifications of H.R. 2273. The specifications for a state coal combustion residuals permit program are: (a) a state program can be no less stringent than the revised criteria promulgated by EPA pursuant to RCRA sections 4004(a) and 1008(a)(3) and revised under section 4010(c); (b) surface impoundments used to manage and dispose of coal combustion residuals are included in the permit program; (c) the structural stability of structures must be assessed according to generally accepted engineering standards; and (d) states have the authority to inspect and enforce a coal combustion residuals permit program in the state. H.R. 2273 allows states to make their program more stringent than the federal baseline, which is the ‘revised criteria’ (as defined above).

H.R. 2273 requires that EPA provide notice to a state that fails to satisfy the following requirements: (a) notification; (b) certification; (c) maintenance of a program under either 4005(c) or 3006; or (d) a state that notifies EPA of its intent to adopt and implement a program and has certified to EPA regarding same but then fails to actually implement the program. H.R. 2273 allows states that receive a notice from EPA an opportunity to respond and cure the deficiencies identified by the Administrator. If the state fails to demonstrate that it has taken steps to remedy deficiencies within a deadline set by EPA (in consultation with the state), EPA may take over the state’s coal combustion residuals permit program. EPA may also adopt and implement a coal combustion residuals permit program in a state that initially notifies the Administrator that it will not adopt and implement a permit program or when a state implementing a program then notifies EPA that it no longer intends to implement the program. States may resume control of the coal combustion residuals permit program from the Administrator if they take the appropriate steps to notify the Administrator and certify that the permit program meets the specifications. For states whose program was assumed by EPA for failure to remedy deficiencies identified by the Administrator, the state must also demonstrate that it has remedied the deficiency in addition to complying with the notification/certification process.

HR. 2273 preserves for EPA its full range of imminent hazard authority under section 7003.

### **Staff Contacts**

If you have questions regarding H.R. 2273, please contact Tina Richards or Jerry Couri with the Committee Majority staff at 5-2927.

## **H.R. 2401, The Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011**

### **Background**

On March 31, 2011, a discussion draft of H.R. \_\_\_, the Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011, was released. On April 7, the Subcommittee on Energy and Power held a legislative hearing on the discussion draft. On May 4, Representatives Sullivan and Matheson, together with other Members, introduced the discussion draft as H.R. 1705. On May 24, the Subcommittee on Energy and Power reported H.R. 1705 and favorably recommended it to full committee. On June 24, Representatives Sullivan and Matheson, together with other Members, reintroduced H.R. 1705, with amendment, as H.R. 2401 ("TRAIN Act").

H.R. 2401 will be the subject of an Energy and Power Subcommittee markup on July 8, 2011. The Majority will circulate the text of any amended version of H.R. 2401, if it is amended, promptly upon the conclusion of the markup, together with an explanation of any changes.

### **The TRAIN Act**

TRAIN Act would establish an interagency committee (the "Committee") for the cumulative analysis of regulations that impact energy and manufacturing in the United States. The bill directs the Committee to analyze and report on the cumulative and incremental impacts of certain rules and actions of the Environmental Protection Agency (EPA).

Section 2 of the TRAIN Act sets forth the composition of the Committee, which will include:

- The Secretary of Agriculture, acting through the Chief Economist;
- The Secretary of Commerce, acting through the Chief Economist and the Under Secretary for International Trade;
- The Secretary of Labor, acting through the Commissioner of the Bureau of Labor Statistics;
- The Secretary of Energy, acting through the Administrator of the Energy Information Administration;
- The Secretary of the Treasury, acting through the Deputy Assistant Secretary for Environment and Energy of the Department of the Treasury;
- The Administrator of EPA;

- The Chairman of the Council of Economic Advisors;
- The Chairman of the Federal Energy Regulatory Commission;
- The Administrator of the Office of Information and Regulatory Affairs;
- The Chief Counsel for Advocacy of the Small Business Administration; and,
- The Chairman of the United States International Trade Commission, Office of Economics.

The Committee will be chaired by Committee members from the Department of Commerce in consultation with Committee members from the Department of the Treasury and the International Trade Commission. The TRAIN Act directs the Committee to consult with and consider pertinent reports issued by the North American Electric Reliability Corporation. The Committee will terminate 60 days after submitting a final report. It should be noted that the Committee's term in H.R. 2401 has been shortened by 30 days from H.R. 1705.

Section 3 of the TRAIN Act describes the analyses that the Committee is required to conduct, including an estimate of the cumulative impacts of covered rules and actions that are proposed or finalized by January 1, 2012. The Committee will also conduct an analysis of the incremental impact of each covered rule proposed but not finalized relative to that cumulative baseline. The Committee's analyses will include the impacts of the covered rules and actions with regard to:

- U.S. competitiveness, including energy intensive and trade sensitive industries;
- other cumulative cost and cumulative benefit impacts;
- changes in electricity and fuel prices;
- impact on national, State, and regional employment both in short- and long-term; and,
- reliability and adequacy of bulk power supply.

The analyses will also include a discussion of the key uncertainties and assumptions associated with each estimate, a sensitivity analysis, and a discussion of the cumulative impact of the covered rules and actions on consumers; small businesses; regional economies; state, local, and tribal governments; local and industry-specific labor markets; and agriculture.

The analyses must be conducted with best available methods and best available data that is available publicly or provided by members of the Committee. It should be noted that H.R. 2401 provides greater clarity than H.R. 1705 with respect to the requirement that the Committee use best available data by expressly limiting best available data to that data which is available to the public or supplied to the Committee by its members with new data not being required to be created.

The TRAIN Act specifies that the following EPA rules and actions are to be covered in the report. It should be noted that certain Clean Water Act rules that were included in H.R. 1705 are not included in H.R. 2401.

- Greenhouse Gas New Source Performance Standards for Petroleum Refineries and Utilities;

- Prevention of Significant Deterioration and Title V permitting for GHG Emissions;
- Ambient Air Quality Standards for Ozone, Particulate Matter, Sulfur Dioxide and Nitrogen Dioxide;
- Clean Air Transport Rule for 28 Eastern States;
- Boiler Maximum Available Control Technology for Major and Area Sources;
- Electric Generating Units Maximum Available Control Technology;
- Coal Combustion Residuals Rule; and,
- Recent actions under the Regional Haze Program.

Section 4 specifies reporting and public comment opportunities. A preliminary report is to be made public and submitted to Congress by January 31, 2012. Public comments will be accepted on the preliminary report for 90 days. The final report is then due by August 1, 2012, including revisions from public comments.

From the outset, the intent of this legislation has been for agencies to improve the economic analyses they are already conducting, and to provide a better picture of the cumulative impacts of multiple regulations affecting the same industries. Because these agencies are already employing economic experts and performing analyses, agencies should be able to coordinate and improve their efforts without significantly increasing their spending. Indeed, agencies already have the ability to shift resources within their existing accounts to complete various projects.

While the intent of the bill's proponents is for agencies to fund this cumulative impact study with existing resources, the reintroduced legislation accounts for the complexities of Congressional Budget Office scoring rules by including in section 5 an authorization of \$3.5 million and corresponding offsets from the Diesel Emissions Reduction Act of 2010 – a program the President did not seek any funding for in his FY 2012 budget.

### **Staff Contacts**

If you have any questions regarding H.R. 2401, please contact Maryam Brown or Heidi King at 5-2927.